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08-856

No. _____

IN THE
Supreme Court of the United States

JOSEPH RODI,
Petitioner,

V.

SOUTHERN NEW ENGLAND SCHOOL OF LAW, et al.,
Respondent.

On the Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

ADDENDUM TO THE SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI SUBMITTED OCTOBER 14, 2008

Joseph Rodi
Pro se
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December 30, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOSEPH RODI,
Plaintiff,

v. **C.A. No. 03-11120-NG**

SOUTHERN NEW ENGLAND SCHOOL OF LAW, FRANCIS J. LARKIN and DAVID M. PRENTISS,
Defendants,
GERTNER, D.J.:

MEMORANDUM AND ORDER RE: MOTION FOR SUMMARY JUDGMENT

March 31, 2007

Plaintiff Joseph Rodi ("Rodi") found himself in a truly unfortunate situation: After graduating from law school he could not take the bar exam in New Jersey because the American Bar Association ("ABA") had not accredited the law school he attended. As a result, he could not practice law in his home state.

Frustrated by these events, Rodi brought suit against the law school, Southern New England School of Law ("SNESL" or "the school"), and two of its former deans, Francis J. Larkin ("Larkin") and David M. Prentiss ("Prentiss"), alleging that the defendants had fraudulently misrepresented the school's prospects for accreditation. He also contends that these misrepresentations constituted unfair and deceptive practices in violation of Chapter 93A of the Massachusetts General Laws.

Based solely on the four corners of Rodi's complaint, I granted defendants' motion to dismiss for failure to state a claim. Two other students filed similar actions, with similar results. Jolicoeur v. SNESL, 03-cv-11159 and Tamborelli v. SNESL, 03-cv-11305. While the First Circuit affirmed the two, it reversed Rodi's claim in part and affirmed other

parts of it. Rodi v. S. New England School of Law, 389 F.3d 5 (1st Cir. 2004). Rodi amended his complaint by, for the most part, recasting his allegations now using the First Circuit's language. His efforts are unavailing. After extensive discovery, Defendants moved for summary judgment [doc. #44].[1] For the reasons explained below, defendants' motion **is GRANTED**.

I. FACTUAL BACKGROUND

In the late 1990s, Southern New England School of Law was attempting to obtain ABA accreditation, thereby enabling SNESL's students to sit for the bar in any state. ABA accreditation is a multi-step process. A law school must first receive a

[1] Along with their motion for summary judgment, defendants have moved to strike several of plaintiff's exhibits. While there is merit in defendants' position, in the interests of resolving the case on the merits and making all reasonable inferences in plaintiff's favor, defendants' motions to strike (docs. 58-61) are all DENIED.

recommendation for provisional accreditation from the ABA's Accreditation Committee (the "Committee"). This recommendation goes to the ABA's Council of the Section of Legal Education and Admission to the Bar (the "Council"), which must in turn recommend the school to the ABA's House of Delegates. Only the House of Delegates has final authority to grant accreditation.[2]

ABA accreditation has been the subject of considerable litigation in this Circuit and elsewhere. For a more complete description of the processes, see Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n., 107 F. 3d 1026, 1029-30 (3d Cir. 1997); Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n., 142 F. 3d 26, 29-31 (1st Cir. 1999).

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[2] Although there may be differences between provisional accreditation and ultimate accreditation, the two are equivalent for the purposes of this suit, as provisional accreditation would enable SNESL graduates to sit for the bar in any state.

I will describe the facts highlighting each statement that has been challenged as a misrepresentation.

1. **Summer 1997 – Statement of Director of Admissions Herbert**

Plaintiff initially attended Massachusetts School of Law, an institution which was not accredited by the ABA. Defendant and Plaintiff does not dispute, that the Massachusetts School of Law dismissed plaintiff after one year for academic reasons and denied plaintiffs petition for readmission. Rodi then applied to SNESL in the summer of 1997.

At the time he applied and was accepted at SNESL, the school had yet to receive any recommendation for ABA accreditation. Plaintiff alleges that Director of Admissions Nancy Hebert had

told him that the school was accredited. Rodi Dep., Def. Ex. D.

This statement was expressly contradicted by the catalogue (see below) and by plaintiff's own admission that he knew at the time of his application that SNESL was not accredited.[3]

2. July 1997 – Statement of Dean Larkin

On July 16, the month before Rodi was to begin school, SNESL received notice from the ABA that the Committee recommended it for provisional accreditation. Later that month, Dean Larkin ("Larkin") sent a letter to all students, which Rodi received, informing them of the positive ABA Committee

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[3] Moreover, plaintiff's version of this statement – that the school "was" accredited conflicts with the version in his Amended Complaint, ¶11. In that version, he says that Nancy Hebert "assured" Rodi that the school "will be accredited by the ABA." Amended Complaint. Hebert, in any case, is not a defendant. Nor does plaintiff argue that SNESL is responsible for Hebert's statement under *respondent superior*. Am. Comp! at ¶39.

recommendation. Larkin said he was "highly confident" that SNESL would be accredited; the school's future had "never been brighter." Pl.'s Ex. 2.

As described below, this statement is not fraudulent at all. Larkin's confidence was entirely justified. He was not aware of any school recommended for provisional accreditation that had not received the final approval. Indeed, nothing in the record contradicts that belief.

Accordingly, plaintiff enrolled at SNESL, moving from New Jersey to Massachusetts to begin classes. At the same time, he received a catalogue from SNESL containing, inter alia, a statement in the same type size and font as the surrounding text.

"The Law School makes no representation to any applicant or student that it will be approved by

the American Bar Association prior to the graduation of any matriculating student." In fact, Larkin's July 1997 letter – optimistic as it was – also made it clear that even the provisional accreditation had to be approved by two other bodies of the ABA.

3. August 1997

The ABA, however, rejected the Committee's recommendation for accreditation in August of 1997. The ABA found that SNESL was not in "substantial compliance" with four ABA criteria and there was "concern" about three other areas. In particular, the ABA Council called attention to ABA criteria relating to: 1) admission of students who appear capable of passing the bar; 2) maintenance of "sound standards of scholastic achievement;" 3) provision of live-client and clinical experience; and 4) hiring of faculty with strong academic credentials, as demonstrated by

scholarly publication. See Def. Ex. I.

It should be noted, however, that while Rodi characterizes the ABA standards as "objective" and SNESL's lack of compliance a factual matter, the ABA process suggests otherwise. Within a short span, two ABA bodies came to opposite conclusions about the school's "substantial compliance" with the standards. While some of the data on which the ABA relied was objective, i.e. LSAT scores, and bar passage rates, the conclusions about "substantial compliance", "sound standards", and "strong academic credentials" involved issues of judgment.

Once the ABA decides not to give accreditation to a school, it has two options. It can either appeal, or it can reapply, and reapplication must wait ten months.

Dean Larkin notified the students immediately, and in a letter whose contents was not challenged, stressed how rigorous the ABA requirements were, and assured the students that the school would work to remedy the ABA's concerns. It reminded the students about the relationship between accreditation and qualifying for the bar exams and ended saying, "our strong showing in the first year of applying for ABA accreditation is a very encouraging sign for a bright future."

4. **September 1997**

Dean Larkin then called a meeting of the student body in September 1997. Plaintiff alleges that Dean Larkin gave "repeated assurances" that the school had in fact rectified the deficiencies identified by the ABA, a statement that is implausible on its face, since SNESL had only

learned of the ABA's concerns the month before. Moreover, Larkin noted that there was "no cause for pessimism regarding its receipt of accreditation in its next attempt." According to plaintiff, Dean Larkin said that the school had been "within an inch" of accreditation and that the school would be accredited by the ABA "the next time around and before you graduate." Pl.'s Am. Compl. ¶16-17; Rodi Aff., Pl.'s Ex. 1.[4] Again, nothing in the record contradicts Larkin's oral statements or those in his August 1997 letter, at the time they were made.

In any event, even if Rodi relied on Larkin's optimism in September of 1997, he was surely on notice that there were problems. While Rodi's Amended Complaint notes only that Dean Larkin "stepped down as Dean," in fact Larkin was pushed

[4] Another witness to Larkin's comments reported that he put his hands together and reported the school was "that close" to accreditation. Pl. Ex. 8.

out. He received a vote of "no confidence" from the faculty. Shortly thereafter, Prentiss assumed the deanship. Larkin Dep., Pl.'s Ex. 5.

5. **Miscellaneous Comments: 1997 – 1999**

Rodi alleges that from 1997 to 1999, he and other students received promises and assurances from the faculty "on numerous occasions and in numerous locations" about the school's accreditation process. Rodi Aff., Pl.'s Ex. 1; Pl.'s Am. Compl. ¶22. During this period, Rodi says that the school also promised to appeal any future unfavorable decision by the ABA.

The problem with Rodi's allegations and the affidavits of the students supporting him is that they refer to statements that are either not dated, not attributed to anyone for whom SNESL is legally responsible, or were not heard by plaintiff.

Defendants cannot rebut – and plaintiff cannot rely – on such material.

6. Summer 1998 – Dean Prentiss' Letter

Notwithstanding Larkin's comments, Rodi considered leaving SNESL after his first year and went so far as to apply to transfer to the law schools at Seton Hall and Rutgers in New Jersey. While he was deciding, in the summer of 1998, he received a letter from Dean Prentiss, who wrote that he would "like the opportunity to make sure [Rodi was] fully informed of the school's current status regarding ABA accreditation." Pl.'s Ex. 4; Def. Ex. I. But Dean Prentiss did more than simply characterize the school's work in seeking accreditation. He attached

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[5] Although the letter references and "enclosed report," neither party provided a copy of the report with the letter as part of the record. However, defendant alleges that the school's self report, which was submitted to the ABA, Def. Ex. P, was attached to the letter, a fact plaintiff does not dispute. Exhibit "P" detailed what the school had done since the last denial of accreditation.

the report that had been submitted to the ABA explaining the progress the school had made toward accreditation.'

The report lists each of the areas in which the ABA had found the school not to be in substantial compliance and documents the school's efforts to respond. Plaintiff does not dispute that the information in the report was accurate.

Dean Prentiss ("Prentiss") concluded that "there should be no cause for pessimism about the school's ultimate achievement of ABA approval." Id.

Rodi was subsequently rejected from Rutgers and Seton Hall and stayed at SNESL.

7. **November 8, 1999 – Hillinger Statement**

On November 8, 1999, several SNESL

students heard Assistant Dean Hillinger ("Hillinger") say that the school was in substantial compliance with ABA requirements and would appeal any unfavorable ABA ruling. Reilly, Costanza, and Corea Affs., Pl.'s Exs. 8-10. Rodi, however, does not claim to have been present on that particular date, but does recall a promise to appeal made by Hillinger at some unspecified time. Rodi Dep., Def. Ex. D. In any event, Rodi does not claim SNESL is liable for Hillinger's comments under respondeat superior. Am. Compl. ¶39.

The same month as Hillinger's alleged promise – November 1999 – the ABA rejected SNESL's second application for accreditation. This time, the school did not even receive an initial recommendation from the Committee. The school did not appeal.

It seems clear from the record that SNESL's situation in the summer of 1999 and thereafter was somewhat different from its situation in 1997 and 1998. There surely had been some deterioration at SNESL in 1999 with respect to the areas that the ABA had expressed concern. The problem is that, apart from Hillinger's comments, the plaintiff can point to no rosy statements about future approval made by SNESL in this time frame.

8. Post-Graduation

Rodi graduated from SNESL in 2000.[6] He sat for the bar exam twice in Massachusetts and three times in Connecticut but did not pass either bar. Def. Ex. D. New Jersey will not allow him to sit for the bar there because he did not graduate from an accredited law school. Rodi applied to the New Jersey Supreme Court for an exemption from this rule, but was denied. Had he taken and passed the New Jersey bar, however, he had a job offer at the public defender's office there. Pl.'s Ex. 16.

II. PROCEDURAL HISTORY

On July 18, 2002, plaintiff sued the defendants in United States District Court for the District of New Jersey. The district court dismissed Plaintiff's action for lack of in personam jurisdiction on April

[6] Rodi failed a course in his final semester. He was permitted to graduate in 2000, after doing "independent study."

10, 2003. Rodi v. S. New Engl. Sch. of Law, 255 F. Supp. 2d 346, 351 (D.N.J. 2003). On June 9, 2003, plaintiff brought suit against the defendants in this Court based upon diversity of citizenship and an amount in controversy exceeding $75,000.

In August 2003, I granted defendants' motion to dismiss for failure to state a claim. Two other students filed similar actions, Jolicoueur v. SNESL, 03-cv-11159 and Tamborelli v. SNESL, 03-cv-11305, which I also dismissed. Both were affirmed on appeal.

In plaintiff's case, the First Circuit reversed in part and affirmed in part on November 10, 2004. The Court of Appeals held that plaintiff had stated a colorable claim as to some of his allegations and granted him leave to amend his complaint in order to plead the sending of a 30-day demand letter

pursuant to M.G.L. c. 93A §9.[7] Rodi v. S. New Engl. Sch. of Law, 389 F.3d 5 (1st Cir. 2004). Following discovery, defendants filed the instant motion for summary judgment. Plaintiff filed an amended complaint, alleging the filing of the 30-day demand letter, and adding, among other things, verbatim quotes from the First Circuit's decision.

III. ANALYSIS

Plaintiff asserts that defendants made material misrepresentations about the school's accreditation prospects. He also contends that SNESL engaged in "unfair and deceptive trade practices," in violation of the Massachusetts

[7] The appeals court did not decide whether plaintiff should be granted leave to amend his complaint to plead some of the fraud allegations with greater particularity, to bring them into compliance with Federal Rule of Civil Procedure 9(b). Although plaintiff has not formally moved for leave to amend, he filed an amended complaint in July 2005. Because defendants received adequate notice with respect to the amended complaint and addressed it in their motion for summary judgment, I will ignore the formalities and address plaintiff's claims as pled in the amended complaint.

consumer protection statute, Mass. Gen. Laws. c. 93A. For the reasons explained below, neither of these claims can succeed as a matter of law.

A. Standard of Review

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Once the moving party demonstrates the "'absence of evidence to support the nonmoving party's case,' the burden of production shifts to the nonmovant." Dow v. United Brotherhood of Carpenters, 1 F.3d 56, 58 (1st Cir. 1993) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).

The nonmovant must then "affirmatively point to specific facts that demonstrate the existence of an authentic dispute." McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995). The court must: view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor,' but paying no heed to conclusory allegations, improbable inferences, [or] unsupported speculation.' If no genuine issue of material fact emerges, then the motion for summary judgment may be granted. Id. (citations omitted).

B. Fraud

As the First Circuit has previously noted in this case, to prove misrepresentation, plaintiff must show: (1) that defendants made false statements of material fact to induce the plaintiff to act, and (2)

that plaintiff reasonably relied upon those statements to his detriment. Rodi v. Southern New England School of Law, 389 F.3d 5, 13 (1st Cir. 2004) (citing Zimmerman v. Kent, 31 Mass. App. Ct. 72, 575 N.E.2d 70, 74 (1991)). Before this inquiry is reached, however, plaintiff must meet the pleading requirements of Federal Rule of Civil Procedure 9(b).

1. Particularity

The Federal Rules of Civil Procedure ("the Rules") require that allegations of fraud be "stated with particularity." This requirement is "satisfied by an averment 'of the who, what, where, and when of the allegedly false or fraudulent representation.'" Rodi, 389 F.3d at 15 (quoting Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 29 (1st Cir. 2004)). Addressing the vague statements in Rodi's original complaint, the First Circuit observed that

statements "made by an unidentified person at an unnamed place and at an unspecified time" were "patently inadequate" under Rule 9(b). Id.

Along the same lines, plaintiff submitted the affidavits of several SNESL students (which were the subject of defendants' motion to strike.)[8] The students make vague allegations, suggesting that "the school" made representations, without saying who the speaker was, or when or where the representations were made. To the extent a date is given, it is often only a year or month, not a particular day or even week. Aside from the fact that these statements were never pled in either the original or amended complaint, the statements must not be considered as potentially actionable comments for lack of particularity. This includes the entirety of the student

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[8] See n.1. supra.

affidavits, Pl.'s Exs. 6-10, with two exceptions, which I address below: (1) the statement Reilly heard from Larkin in September 1997, about the school being "that close" to accreditation, Pl.'s Ex. 8, and (2) the statement from Assistant Dean Hillinger in November 1999 promising to appeal, that was heard by three of the students (although not Rodi, as described below). See Pl.'s Ex. 8-10. Likewise, Rodi's vague allegation that someone at the school made statements from 1997 to 1999 promising to appeal is not actionable.

Defendant also challenges the particularity with which Dean Larkin's statements in September 1997 were pled. Because plaintiff has identified the speaker, the month, and the location of these statements, I conclude these statements meet the particularity requirements. Defendants could easily

have identified the precise date and time of the student body meeting from their records.

2. **Agency**

Another preliminary issue is defendants' responsibility for the comments of Assistant Dean Hillinger, Director of Admissions Hebert, and Professors Pauley and Rudko. Defendants argue, and plaintiff does not appear to dispute, that these four individuals, none of whom are named defendants, were not agents of the school for the purposes of *respondeat superior*. Indeed, in the Amended Complaint, plaintiff claims only that the school was responsible for the statements of Deans Larkin and Prentiss. See Am. Compl. at ¶39; Pl's Opp. to S.J. at 16. Pl. Exh. 1, par. 6 (noting that Rodi relied only on the comments of "the Deans.")

To be sure, SNESL could conceivably be held

responsible for the statements of their high-ranking administrators, including Hillinger and Herbert, if plaintiff reasonably believed that they had authority to make statements binding the school in the scope of their employment. See, e.g., Veranda Beach Club LTD. Partnership v. Western Sur. Co., 936 F.2d 1364, 1377 (1st Cir. 1991). Plaintiff, however, has not made that assertion in his Amended Complaint.

3. Do These Statements Comprise Actionable Misrepresentation?

To constitute actionable misrepresentation, a statement must obviously be false. See, e.g., Zimmerman v. Kent, 31 Mass. App. Ct. at 78. ("The first requirement to sustain a claim of misrepresentation is that the representation must be false.") It is not necessary, however, for the speaker to know the statement is false, if the truth is "reasonably susceptible of actual knowledge." Id. at 77 (quoting Acushnet Fed.

Credit Union v. Roderick, 26 Mass. App. Ct. 604, 605 & n.1 (1988)). Moreover, a misrepresentation claim may lie only based on a statement "of fact, not of expectation, estimate, opinion, or judgment." Zimmerman v. Kent, 31 Mass. App. Ct. at 79 (citing Powell v. Rasmussen, 355 Mass. 117, 118 (1969)).

Nevertheless, the First Circuit highlighted two instances in which even opinions may be actionable. First, if the speaker led the listener to believe that he had inside information about facts which were not true, the statements may qualify. As the First Circuit put it, a statement may be actionable if: it may reasonably be understood by the reader or listener as implying the existence of facts that justify the statement (or, at least, the non-existence of any facts incompatible with it.)

Rodi, 389 F.3d at 14 (citing McEneaney v. Chestnut Hill Realty Corp., 38 Mass. App. Ct. 573, 650 N.E.2d 93, 96 (1995)).

This is particularly true where the speaker is "understood to have special knowledge of facts unknown to the recipient." McEneaney v. Chestnut Hill Realty Corp., 38 Mass. App. Ct. 573, 650 N.E.2d 93, 96 (1995) (finding a statement that a condominium was "quiet" to be a statement of fact). See also Briggs v. Carol Cars, Inc., 407 Mass. 391, 396 (1990) (finding a statement that a used car was in "good condition" to be a statement of fact where the mechanic's words could "reasonably be interpreted by the recipient to imply that the maker of the statement knows facts that justify the opinion"); Stolzoff v. Waste Systems Int'l, Inc., 58 Mass. App. Ct. 747, 792 N.E.2d 1031, 1042 (2003)

(finding "upbeat representations to the plaintiffs about how well things were going" to be actionable statements of fact, not opinion, but also noting that "statements concerning the future value of the company's stock, plainly concerning future events and being inherently speculative in nature, are not actionable as a matter of law").

Second, a statement of opinion may be actionable if the speaker in fact knew of the existence of objective facts which contradict the opinion expressed. In this context, the speaker's statement would qualify as misrepresentation if he knew of "disqualifying and probably irremediable deficiencies" that would prevent SNESL from achieving accreditation. Rodi, 389 F.3d at 14.

Apart from the allegations that must be dismissed for lack of particularity or agency, as

discussed above, plaintiff contends that the following representations were false: (a) Larkin's letter in July 1997, stating he was "highly confident" about SNESL's accreditation prospects; (b) Larkin's statements to the student body in September 1997 that the school had been "within an inch" of accreditation, that the school had "rectified any deficiencies," and that there was "no cause for pessimism" regarding the school's future accreditation prospects; and Prentiss' letter in July 1998 suggesting there was "no cause for pessimism" about accreditation. I will address each statement in turn.

a. **Dean Larkin's Letter**

Addressing Dean Larkin's July 1997 letter at the motion to dismiss stage and thus, only on the basis of the allegation in the initial complaint, the First Circuit found that the letter could be actionable if, at the time

he wrote it, Larkin knew that there were "irremediable deficiencies" in the school application that disqualified it from accreditation. On the record before me at summary judgment, it is clear this was not the case.

When Dean Larkin wrote to Rodi in July 1997, SNESL had just learned that the ABA Committee recommended provisional accreditation. The ABA's letter was enormously supportive and unequivocal. Larkin had every reason to be optimistic; this was, undoubtedly, a huge, positive step for the school. Defendants state, and plaintiff does not contest, that Larkin was not aware of any school that had ever been recommended for accreditation and not received it. Larkin Dep., Def. Ex. N. Indeed, at the summary judgment hearing, plaintiff's counsel conceded that Dean Larkin may well have had legitimate reason to be "highly confident" when he wrote the letter.

Because the statements were not false at the time they were made, this letter was not a misrepresentation and is therefore not actionable.

b. Dean Larkin's September Statements

Plaintiff alleges that in September 1997, a month after the ABA had rejected the recommendation of its own committee, Dean Larkin told the student body that the school had been within "an inch" of accreditation. Dean Larkin made "repeated assurance" that the school had rectified any deficiencies, leaving "no cause for pessimism" about future accreditation. Indeed, Dean Larkin allegedly went so far as to promise that the school "will be accredited by the ABA the next time around and before you graduate."

As noted above, the statement that the school had been "within an inch" of accreditation was not

false. See Zimmerman v. Kent, 31 Mass. App. Ct. at 78 (requiring a statement to be false to constitute a misrepresentation). Indeed, in the preliminary recommendation for accreditation, it was clear that the school had met all but a handful of the ABA requirements. Larkin understood that the history of the ABA accreditation process at other schools made accreditation extremely likely if it received the Committee's recommendation. His characterization of the process and SNESL's status was not false.

[9]In any case, Rodi had more than just Larkin's words on which to rely. The ABA report, containing the underlying factual information with respect to the accreditation denial, was a public document,

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[9] While the plaintiff claims that his efforts to find out the basis for the ABA's decision and the school's response were stymied, he does not deny that the school's self report was attached to Dean Prentiss' 1998 letter. In addition, Larkin indicated that the report was available in the library. Larkin Dep. Def. Ex. n, 73.

available to all students. This is not a case where plaintiff had to conduct extensive research to discover the basis for the Deans' statements or that the information was unavailable to him.' Nor is it the case that reading the report took some special expertise not available to the plaintiff. Rodi, after all, was a law student. The report, its language, the data on which it was based, was entirely accessible to him.

To the extent Larkin was describing what had happened during the summer of 1997 and how close SNESL had come to accreditation, the statements were not false. To the extent he was predicting what the ABA was or was not going to do in the future, plaintiff could not reasonably have relied on them, for the reasons discussed below.

c. **Dean Prentiss' Letter**

Dean Prentiss wrote to Rodi in the summer of

1998, knowing that Rodi was considering leaving SNESL. The parties do not dispute that this letter was intended to induce Rodi to stay at the school. Significantly, Dean Prentiss enclosed the report that the school had sent to the ABA, describing the work the school had done to address the ABA's concerns. It noted that in each of the areas the ABA noted that there had been "improvement" and "progress." It noted that they "looked forward" to bringing the ABA team back to the school. It then touted SNESL's support to its students and concluded:

> In addition, as disappointing as the ABA decision was last year, it is not unusual for a school to be turned down on its first try Given that this is the nature of the accreditation process, and considering all the progress we have made this year, there should be no cause for pessimism about the school's ultimate achievement of ABA approval.

Pl.'s Ex. 4. The letter stated "[t]he four areas

in which the ABA determined that the school is not in substantial compliance with its standards have been improved." Id.

Plaintiff does not dispute the accuracy of these statements – that there was improvement in the designated areas in 1998. Nor does plaintiff contest defendant's assertion that Dean Prentiss included with the letter a report sent to the ABA explaining the school's progress.' Nor does plaintiff contest the accuracy of the other representations made in the report.

I find this letter not to be actionable for two reasons. First, in the context of the letter, the phrase "no cause for pessimism" was a statement of opinion about what the school had done to meet the ABA's concerns. As noted above, an opinion may be actionable if it is reasonably understood as "implying

[10]the existence of facts that justify the statement (or, at least, the non-existence of any facts incompatible with it). Rodi, 389 F.3d at 14 (citing McEneaney v. Chestnut Hill Realty Corp., 38 Mass. App. Ct. 573, 650 N.E.2d 93, 96 (1995)). But nothing was implied here; everything was out in the open. Dean Prentiss had attached the report to the ABA about what steps the school had taken, information whose accuracy plaintiff does not dispute. Because all the facts here were provided along with the opinion, Rodi could not reasonably have understood the opinion to imply the existence of facts contrary to those provided to him in the letter and the accompanying report.

Nor did Prentiss know of "disqualifying and probably irremediable deficiencies" at the time he made the statement. Rodi, 389 F.3d at 4. Absolutely

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[10] See n. 5, supra.

nothing in the record suggests that as of the time the representations were made in 1998 any such deficiencies were known to Prentiss. To the extent that plaintiff relies on data after Prentiss' 1998 letter, namely that in the ABA's second denial in November 1999, it can hardly be the basis for a misrepresentation finding for statements made in 1997-98. Based on the November 1999 denial, the school's situation had deteriorated but nothing in the record remotely suggests that those problems were known to Prentiss in 1998.[11]

(1) The plaintiff points out that the Accreditation Committee noted that the bar passage rate of SNESL students dropped from 52% in the summer of 1998 to 31% in the summer of 1999. Pl. Ex. 11 at S359. During that period the Report notes that the bar passage rate was increasing from 45% to 52% in 1998 to 62.3% in February 1999. The bar pass rate in the summer of

[11] The 1999 deficiencies included, for example

1999 could not possibly have been known to either Francis Larkin or David Prentiss in 1997 or 1998.

(2) The plaintiff says that there was a shortfall in admissions in 1999 to 2000. (Id. at S356.) This appears to be true, but it cannot be the basis for a misrepresentation claim based on statements made in 1997 and 1998. In any event, the plaintiff has pointed to no ABA standard which would govern this.

(3) The plaintiff notes that the Committee found that the school had an operating loss in 1998 to 1999. (Id. at S363.) The plaintiff ignores, however, the Committee's finding that introduces this paragraph: "The site team noted that the Law School is 'operated in a financially stable' manner. It also indicated that the School is in good conservative hands and that steady, stable, conservative financial planning is apparent in the managed growth of the institution." Id.

(4) The plaintiff notes that the Committee raised the issue that the 1999-2000 budget projections were overly optimistic, arguably because of a decline in the number of first year students from what had been anticipated. (S363) First, a budget shortfall

in 1999 to 2000 cannot be the basis of a misrepresentation claim based on statements in 1997 and 1998. Second, the Committee goes on to explain that the school has revised its budget to reflect the decreased numbers. When questioned about whether these projections were realistic, the Committee concluded that "the Dean's October letter details why these enrollment projections are realistic." (Id. at S364).

(5) The plaintiff states that the school's library "made significant cuts in the library's 1999 to 2000 budget." (Id. at S361) The plaintiff neglects to add the following sentence found in the Report: "Because the materials she [the librarian] eliminated from the budget were either inaccessible for technological reasons or were seldom used, the cuts in the library budget do not affect the library's ability to support the research needs of students and faculty." (Id. at 5361-S362).

In any case, even if the letter were an actionable misrepresentation, Rodi's reliance was not reasonable for the reasons described below.

4. Reasonable Reliance

[12]Even if Dean Larkin's statements and Dean Prentiss' letter constituted material misstatements, plaintiff must also establish that he reasonably relied on these statements. Although "the reasonableness of a party's reliance ordinarily constitutes a question of fact for the jury," Rodi, 389 F.3d at 16, there may be situations where the facts preclude a finding of reasonableness. Id. at 17. The

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[12] Because I have found that plaintiff does not claim that Hillinger was an agent of the school, his statements are not actionable. Nonetheless, it is worth noting that even if Hillinger were an agent for the purposes of SNESL's liability here, plaintiff could not have reasonably relied on his statements for two reasons. First, as to the Hillinger statements discussed in the affidavits of other students, Rodi did not allege that he personally heard these statements: he could not reasonably have relied on statements he did not hear. Rodi himself only recalls hearing promises of appeal at sometime between 1997 and 1999; this vague allegation fails for lack of particularity. Secondly, Hillinger's statements in November 1999 occurred the same month as the second denial of accreditation. They came during the middle of an academic semester, a time in which students would not have been making immediate decisions about staying at or leaving the school. Moreover, at least as of December 8, 1999, Dean Ward, in a letter to the ABA, indicated that the school did intend to appeal. Pl's. Ex 12

law does not require that plaintiff conduct an extensive investigation of every statement made to him. Kuwaiti Danish Computer Co. v. Digital Equip. Corp., 438 Mass. 459, 467 (2003). One may not, however, reasonably rely on a statement "if he knows that it is false or its falsity is obvious to him." Id. at 468.

a. Dean Larkin's Statements

Two fundamental problems prevent any reliance on the September 1997 statements from being reasonable. First, the school had only been denied accreditation one month before. Therefore, it would have clearly been impossible for the school to have fixed deficiencies in its application, and any reliance on a statement to this effect, assuming that is what it meant, would have been inherently unreasonable.

Secondly, any promise or guarantee of accreditation was squarely contradicted by the disclaimer in the school's student handbook. Every year, the school handbook stated "The Law School makes no representation...that it will be approved by the American Bar Association prior to the graduation of any matriculating student." Def. Ex. A to Hebert Affidavit.

To be sure, as the First Circuit reminded us, disclaimers do not automatically defeat claims of fraudulent misrepresentation. Rodi, 389 F.3d at 17 (citing Massachusetts cases). The Court suggested what the disclaimer remedied depended upon what the misrepresentation was. If the misrepresentation was - "we will be accredited by the ABA," i.e., a representation about a third party – that could be addressed by a disclaimer that says – "we make no representation about what that third party will do."

But if the misrepresentation concerned the defendants' acts – whether it had "the capacity to achieve near-term accreditation," then the disclaimer would arguably miss the mark.

Under the circumstances, this disclaimer was adequate: To the extent Dean Larkin was referring to what SNESL would do, his statements were entirely accurate. Over the following year, SNESL took a number of steps to address the ABA's concerns. To the extent Dean Larkin was making predictions about what the ABA would do, the disclaimer was on the mark. The disclaimer was placed in a conspicuous location – near the front of the student handbook – to which Rodi had regular access.

In any case, Dean Larkin received a vote of "no confidence" from the faculty shortly after September

1997. The faculty vote at the very least put Rodi on notice that the school did not endorse Dean Larkin or consider his approach to the issue reasonable. Any reliance on Dean Larkin's statements after this vote was unreasonable.

Taken together, the recent denial of accreditation, the presence of the disclaimer, and the vote of no confidence fatally undermines Rodi's argument that reliance on Dean Larkin's September 1997 statements was reasonable.

b. Dean Prentiss' Letter

To the extent Rodi found the "no cause for pessimism" statement in Prentiss' 1998 letter to be a wholehearted endorsement of the school's likelihood of ABA approval, it would not have been reasonable to rely on this statement for two reasons. First, the letter itself, taken as a whole, casts doubt on that

conclusion. It included a report accurately describing the school's current status with respect to accreditation. This did not require Rodi to research the falsity of the letter but simply to read the entire mailing. His failure to do so and his decision to rely on any one sentence in the letter cannot be blamed on the letter's author.

A person "claiming justifiable reliance is 'required to use his sense, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he utilized his opportunity to make a cursory examination or investigation." Collins v. Huculak, 57 Mass. App. Ct. 387, 392, 783 N.E.2d 834, 839 (2003) (quoting Restatement (Second) of Torts at §541 comment a). See also Kuwaiti Danish Computer Co. v. Digital Equip. Corp., 438 Mass. 459, 468 (2003) (finding that reliance

was not reasonable where "[t]he qualifying language was presented essentially contemporaneously" with the alleged misrepresentation and "[a]ll that was required...was that they read the document to ascertain the obvious.").

Secondly, Dean Prentiss said that there was "no cause for pessimism about the school's *ultimate* achievement of ABA approval" (emphasis added). Plaintiff could not reasonably have interpreted this statement to guarantee accreditation in any given time frame, namely, the two years before he graduated.

Thus, even if the alleged statements by Deans Larkin and Prentiss were misrepresentations, plaintiff could not reasonably have relied on the former's statements in 1997 nor the latter's letter in 1998.'

5. Causation

"Finally, even if plaintiff had stated his fraud claim with particularity and could show that he reasonably relied on defendants' misrepresentations, it is not clear that he could prevail on the issue of causation. Plaintiff has taken the bar five times – twice in Massachusetts and three times in Connecticut – and has not passed on any occasion. While the New Jersey bar exam, the exam in the state in which he wishes to work, has a practical component different from those two states and weights the exam sections differently, New Jersey

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[23] Plaintiff also claims in his brief -- although not the amended complaint -- that the school misrepresented its plan to appeal the November 1999 denial. His statements are vague; there is no indication when or where such promises were made. In any event, even if such statements were made in 1997 or 1998, there is no indication that the defendants did not have that very intention. Nor can plaintiff show that he was harmed by the failure to appeal. The 1999 denial came in plaintiff's last year at SNESL. He cannot show that an appeal would have succeeded, much less that he relied on it at that time.

actually has a lower passage rate than either Massachusetts or Connecticut. Plaintiff has not demonstrated that he would necessarily pass the New Jersey exam and admits that the question of passage is speculative at best; "We will never know whether Mr. Rodi could have passed the New Jersey bar exam." Pl.'s Opp. to S.J. at 18. In the face of such speculation about Rodi's bar passage prospects in New Jersey, this Court cannot conclude that the school's lack of accreditation caused the plaintiff's current inability to practice law in that state.

c. **Chapter 93A Claim**

Plaintiff has also alleged a cause of action for unfair and deceptive business practices under Massachusetts General Laws Chapter 93A. Plaintiff has not stated a cause of action for fraud or negligent misrepresentation. Since his 93A claim rests on the

same foundation, I therefore **GRANT** summary judgment on this claim.

IV. CONCLUSIONS

Many of the statements plaintiff alleged to be misrepresentations were not pled with particularity. These claims cannot survive the pleading requirements of Rule 9(b). Of the claims that were properly pled against SNESL or its agents, plaintiff has not demonstrated that he reasonably relied on false and misleading statements made by the defendants. Consequently, he cannot prevail on either his fraud or his Chapter 93A claim. I therefore GRANT defendants Southern New England School of Law, Francis J. Larkin and David M. Prentiss' Motion for Summary Judgment (document #44).

Additionally, the following motions are **DENIED**:

(1) Document #58 – MOTION to Strike Portions of the Affidavit of Joseph Rodi;

(2) Document #59 – MOTION to Strike Defendants' Motion to Strike the Affidavit of Jonathan Plaut;

(3) Document #60 – MOTION to Strike The Affidavits of Brian Tamborelli, Guilin Jolicoueur, John Reilly, Joseph Costanza, and Nicola Corea; and,

(4) Document #61 – MOTION to Strike the Plaintiff's Expert Disclosure (RENEWED).

SO ORDERED.

Date: March 31, 2007 **s/Nancy Gertner**

NANCY GERTNER,
U.S.D.C.